No. 73-1471

In the Supreme Court of the United States

OCTOBER TERM, 1973

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UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

NEW JERSEY STATE LOTTERY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT H. BORK,
Solicitor General,
THOMAS E. KAUPER,
Assistant Attorney General,
HOWARD E. SHAPIRO,
Attorney,
Department of Justice,
Washington, D.C. 20530.

DANIEL R. OHLBAUM,
Acting General Counsel,
JOSEPH A. MARINO,
Associate General Counsel,
B. MICHAEL SHENKOWSKY,
Counsel,
Federal Communications Commission,
Washington, D.C. 20554.

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v.

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The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–10a) is not yet reported. The Commission's memorandum opinion and order (App. C, *infra*, pp. 13a–26a), which was reversed by the court of appeals, is reported at 36 FCC 2d 93.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1974 (App. B, *infra*, pp. 11a–12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition in 18 U.S.C. 1304 of the broadcast of "any * * * information concerning any lottery" or of "any list of the prizes drawn or awarded by means of any such lottery" applies to the announcement during newscasts of the winning number in the New Jersey State Lottery, and is constitutional as so applied.

STATUTES INVOLVED

18 U.S.C. 1304 provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

47 U.S.C. 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. 312 provides:

> (a) The Commission may revoke any station license or construction permit——
>
> * * * * * *
>
> (6) for violation of section 1304, 1343, or 1464 of Title 18.

47 U.S.C. 503 provides:

> * * * * * *
>
> (b)(1) Any licensee or permittee of a broadcast station who——
>
> * * * * * *
>
> (E) violates section 1304, 1343, or 1464 of Title 18,
>
> shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter.

STATEMENT

On Thursday morning, each week, the New Jersey State Lottery Commission draws and announces the winning lottery number. Broadcasters, including Jersey Cape Broadcasting Corp., licensee of WCMC–AM–FM–TV, are notified of the winning number by Associated Press teletype machines. Many of Jersey Cape's listeners are aware of this fact, and "each Thursday the station is bombarded with scores of tele-

phone calls by residents requesting the winning number" (App. 4a).[1]

Jersey Cape sought a declaratory ruling from the Federal Communications Commission as to whether broadcast announcement of the winning lottery number would constitute a violation of 18 U.S.C. 1304, which bars the broadcast of "any * * * information concerning any lottery * * *." Under the Communications Act, the Commission may revoke the license of, or impose a daily forfeiture of $1,000 upon, any licensee who violates Section 1304. 47 U.S.C. 312(a)(6), 503(b)(1)(E). Jersey Cape proposed to broadcast during three consecutive newscasts on the day of the lottery drawing the following statement (App. 5a):

> The winning state lottery number drawn today is (and then recite the winning number).

It contended that the proposed broadcast would not constitute a lottery or direct promotion of a lottery. Rather, it urged "that the prime effect of the broadcast would be to inform the listening public of a legitimate news items about which they have a keen interest, and, that only 'incidently' is there any promotion of a lottery" (*ibid.*).

In a declaratory ruling on July 20, 1971, 30 FCC 2d 794, the Commission concluded[2] that the announcement would constitute a direct promotion of a lottery, and thus is barred by 18 U.S.C. 1304, as construed in *New York State Broadcasters Association* v. *United States*, 414 F.2d 990 (C.A. 2), certiorari denied, 396 U.S. 1061. There the Second Circuit held that 18 U.S.C. 1304, *inter alia*, prohibits broadcasts of "so-called news that directly promotes the Lottery, e.g., broadcasting lists of winners." 414 F.2d at 999.

In a petition for reconsideration the New Jersey State Lottery Commission described the operation of the lottery in more detail (App. 18a–20a). It pointed out that one number drawn each week is the basis for the award of 18,000 or more prizes; that approximately 2.75 million people per week purchase New Jersey State Lottery tickets; and that this group represents approximately 58 percent of the adult population of the State.

Relying largely on the Second Circuit's opinion in *New York State Broadcasters, supra*, the Commission again rejected the proposal to permit the winning number to be announced over the airways (App. 24a–38a). It stated that the mere fact that the stations receive the winning lottery number from independent wire services does not establish that such information is "to be regarded as a legitimate news story appropriate for broadcasting," and that the popularity of the lottery "cannot change the law to permit the broadcast of information directly promoting a lottery" (App. C, *infra*, p. 21a). The Commission added that "* * * petitioner's admission that it needs to announce the winning number over the air because it does not have the information necessary to deter-

[1] "App." refers to the Appendix in the court of appeals, a copy of which has been lodged with the Clerk.

[2] Before announcing its decision, the FCC requested the views of the Criminal Division of the Department of Justice, which expressed its continuing opposition to any "relaxation of restrictions on legal gambling," and recommended that the Commission view the broadcast of the winning lottery number as a promotional announcement (App. 8a–9a, 10a–11a).

mine the identity of the winner merely serves to reinforce the finding that the broadcasts of the winning number would directly promote the lottery, or as we said in *Jersey Cape,* that the 'widespread dissemination' of this information is 'reasonably necessary or helpful to the conduct of the lottery' " (App. C, *infra,* p. 23a).

The Commission recognized "the anomalous situation where the several states have enacted state lottery legislation and in accordance therewith are operating constitutional State lotteries and, in an effort to bring the lottery to the attention of their citizens, desire to utilize the broadcast media" (App. C, *infra,* p. 26a). But it held that it had "no alternative but to apply the requirements of" Section 1304 until it is amended or qualified, and that "[t]he issue is for Congress and not the Commission to resolve * * *" (*id.* at 26a, 24a).

On the Lottery Commission's petition for review, the Court of Appeals for the Third Circuit, *en banc,* unanimously reversed the Commission's ruling. The court held that the Commission had misconstrued 18 U.S.C. 1304, since, in the court's view, "[n]othing in that statute was intended to permit the exercise by the FCC of control over editorial decisions of broadcast journalists" (App. A, *infra,* p. 5a). The court viewed the Commission's ruling as inconsistent with the First Amendment's guarantee of freedom of the press.

In an effort to reconcile Section 1304 with that guarantee and with the anti-censorship provisions of 47 U.S.C. 326, the court concluded that news broadcasts are exempt from the prohibitions of Section 1304, which should be construed to apply only "to promotion of lotteries for which the licensee receives compensation" and perhaps also to "some uncompensated promotional announcements outside the context of broadcast journalism [which] might be found by the FCC to be promotional, and not news * * *" (App. A, *infra,* p. 9a).

REASONS FOR GRANTING THE WRIT

Eight states presently conduct lotteries to raise revenue.[3] There is, however, a long established federal statutory policy barring use of the mails or of the channels of interstate commerce for the conduct of lotteries, whether or not legal under state law. *In re Rapier,* 143 U.S. 110. It is illegal to import lottery tickets or to transport them in interstate commerce (18 U.S.C. 1301), to disseminate them in the mails (18 U.S.C. 1302), or to broadcast "any * * * information concerning any lottery" (18 U.S.C. 1304). In addition, it is illegal under 18 U.S.C. 1953 for non-common carriers to carry or send wagering paraphernalia, such as lottery tickets, in interstate commerce. *United States* v. *Baker,* 364 F.2d 107 (C.A. 3), certiorari denied, 385 U.S. 986.[4]

[3] They are New Jersey, New York, Pennsylvania, Massachusetts, Connecticut, Michigan, Maryland and New Hampshire. In addition, on November 6, 1973, a Maine referendum approved establishment of a state lottery and a Rhode Island referendum repealed a ban on such lotteries in the state constitution.

[4] The express anti-lottery policy of these statutes distinguishes them from 18 U.S.C. 1952, which bars travel or use of the mails or facilities in interstate or foreign commerce to carry on unlawful activities, including gambling where barred by state law. Cf. *Erlenbaugh* v. *United States,* 409 U.S. 239, holding that shipment of a "scratch sheet" in commerce violates Section 1952.

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Congress' intention that the Federal Communications Commission should apply this policy to broadcast licensees is clearly stated. 47 U.S.C. 312(a)(6), 503(b)(1)(E). However, serious questions under the First Amendment may arise in the application of Section 1304 to broadcasting. To narrow these questions, the Court of Appeals for the Second Circuit has held that only information directly promoting a lottery is barred from broadcast by Section 1304. *New York State Broadcasters Association* v. *United States, supra.* In the instant case, the Third Circuit has held, to the contrary, that a broadcaster may carry information which directly promotes or facilitates a lottery, such as the winning ticket number, so long as it is not directly compensated for doing so; if it carries the information in the name of editorial "news" judgment, the statute is not applicable.

1. In *New York State Broadcasters, supra,* the Second Circuit reviewed a declaratory ruling by the Commission that Section 1304 bars advertising and other broadcasting which would promote lotteries, whether legal or illegal. The Commission had refused in that case to issue specific rulings on such questions as whether news reports of recent events about or relating to the New York State Lottery could be broadcast; the legality of broadcasting unpaid announcements indicating places where lottery tickets could be purchased and where and how tickets would be drawn; the legality of live broadcasts of lottery drawings; or whether interviews with persons holding winning tickets in either legal and illegal lotteries could be

broadcast (414 F. 2d at 992–993). The Commission had stated, however, that Section 1304 does not bar ordinary news reports on public policy concerning lotteries (*id.* at 993–994).

The Second Circuit generally upheld the constitutionality of Section 1304, but stated that it must be narrowly and carefully construed; it set aside the Commission's ruling and directed it to address the specific questions noted above. In doing so, the court noted that the Commission's judgments as to what types of lottery information may be broadcast must be considered "not as an exercise of the power to regulate broadcasting in the public interest necessitated by the nature and technology of broadcasting, but as enforcement of the clear congressional policy embodied in section 1304" (*id.* at 995).

The court in *New York State Broadcasters* further stated that the statute would be unconstitutional if read literally to prohibit all information concerning lotteries. Relying, however, upon past interpretations of mail statutes (upon which Section 1304 had been based), the court concluded that Congress intended to prohibit the possibility that the airwaves would be used for advertisements and information that directly promotes a particular lottery (414 F. 2d at 998):

> There is a difference between information directly promoting a lottery and information that is simply "news" of a lottery. If a "news" item has the incidental effect of promoting a lottery, it is not banned; but if a lottery advertisement or announcement contains "news," such as the

> amount a lottery realized for education, it would nonetheless be banned. We are aware that at times the line may be thin, but this will be the unusual rather than the common case because advertisements and announcements will ordinarily be more direct and exhortative.

The court specifically held that the statute bars "so-called news that directly promotes the Lottery, e.g., broadcasting lists of winners." 414 F. 2d at 999.

On remand in the *New York State Broadcasters* case, the Commission issued a Supplementary Declaratory Ruling, implementing the Second Circuit's decision (21 FCC 2d 846). It ruled that Section 1304 prohibits broadcasts, whether paid or unpaid, "of the places where lottery tickets may be purchased, where, how, and when winning tickets will be drawn, the amount of prizes, and how the proceeds of the sales of lottery tickets are and will be distributed" (App. C, *infra*, p. 20a). In the present case the Commission held that under this ruling Section 1304 also bars broadcasts of the winning number in the New Jersey State Lottery (*ibid.*).

The Second Circuit's decision in *New York State Broadcasters* thus interprets Section 1304 quite differently from the Third Circuit's decision in the instant case. The Second Circuit's test emphasizes whether the broadcast directly promotes or facilitates the lottery. The Third Circuit's test concentrates instead on the financing of the broadcast—whether the station is paid to present the announcement. And the two courts clearly differ on the result required by the statute with

respect to the kind of announcements at issue here. The Court should grant this petition in order to resolve this conflict in the circuits, and because the decision below has effectively declared a portion of an Act of Congress unconstitutional.

2. The Third Circuit's decision in this case was obviously intended to protect the journalistic discretion of the news media. That discretion is at the heart of the First Amendment. But certain narrowly defined categories of communication, even when carried on by the press, are not within the broad protection of that Amendment. *E.g., Valentine* v. *Chrestensen,* 316 U.S. 52, and *Pittsburgh Press Co.* v. *Human Relations Commission,* 413 U.S. 376 (commercial speech)[5]; *Roth* v. *United States,* 354 U.S. 476, and *Miller* v. *California,* 413 U.S. 15 (obscenity); *Donaldson* v. *Read Magazine,* 333 U.S. 178, 189, and *Public Clearing House* v. *Coyne,* 194 U.S. 497 (schemes to defraud). Communications which serve only to implement, promote or facilitate gambling schemes, including state-operated lotteries, are in the same category. *In re Rapier, supra,* 143 U.S. at 134–135; *New York State Broadcasters, supra.*

The Third Circuit's attempt to distinguish between broadcasts of winning numbers for which the broadcaster is directly compensated and "newscasts" of the same information is not supportable. The substantive nature of the information communicated, not its form as "editorial" or "advertising" matter, governs the

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[5] In *Pittsburgh Press* this Court took express note of the decision in *New York State Broadcasters, supra,* 413 U.S. at 387, n. 11.

scope of the First Amendment's protection. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266. And it is immaterial, for First Amendment purposes, that one who publishes information may have been directly compensated for doing so (*ibid.*). *Pittsburgh Press, supra*, 413 U.S. at 384–385. Indeed, broadcasters are obviously "compensated" for announcing lottery numbers by the large audience of gamblers they attract. This in turn attracts advertisers and affects the rates they can be charged. In sum, the Third Circuit's holding that Section 1304 bars a broadcaster from carrying paid announcements of winning numbers, but permits him regularly to broadcast the same information as "news" in his journalistic discretion, completely defeats the purpose of Section 1304 without serving any First Amendment values. There is a clear difference between news about activities on which people gamble and information which has no purpose other than the conduct of gambling. *New York State Broadcasters, supra*, 414 F. 2d at 997.

Information about horse races, sporting events, and even the stock and commodity markets are of interest to large numbers of people who may gamble on such matters. But such information also has intrinsic meaning, wholly apart from gambling, for persons who are interested in sports or who have an economic, governmental, or scholarly interest in the markets. Winning lottery numbers, on the other hand, have no meaning except in connection with consummating the lottery itself. Announcement of the winning numbers "does not affect the political process, does not

contribute to the exchange of ideas, does not provide information on matters of public importance, and is not * * * individual self expression."*

Since announcement of the winning numbers serves only to carry on the lottery, it is conduct which Congress may bar from the public airwaves and the channels of interstate commerce, rather than protected speech.

Nothing in the Commission's narrow ruling in this case precludes the broadcast of news stories, documentaries, debates, or discussions concerning the merits of lotteries, their effects, or the way they are being administered by the state. Cf. *Pittsburgh Press, supra*, 413 U.S. at 385. On the contrary, these First Amendment interests have been scrupulously preserved by the Commission, following the Second Circuit's standards. But the Commission would have been "remiss in its duties if it failed, in the exercise of its * * * authority, to aid in implementing [Section 1304]," with respect to the narrow areas of communication to which that statute applies. *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289.

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* *Banzhaf* v. *Federal Communications Commission*, 405 F. 2d 1082, 1101–1102 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute, Inc.* v. *Federal Communications Commission*, 396 U.S. 842.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
Attorney.

DANIEL R. OHLBAUM,
Acting General Counsel,
JOSEPH A. MARINO,
Associate General Counsel,
R. MICHAEL SENKOWSKI,
Counsel,
Federal Communications Commission.

APRIL 1974.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 72-1878

NEW JERSEY STATE LOTTERY COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA AND

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

COMMONWEALTH OF PENNSYLVANIA, STATE OF NEW HAMPSHIRE, INTERVENORS

On Petition for Review of an Order of the Federal Communications Commission

Argued May 15, 1973

Before VAN DUSEN, GIBBONS and ROSENN, Circuit Judges

Submitted On Rehearing November 15, 1973

Before SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges

Opinion of the court

(Filed January 2, 1974)

GIBBONS, *Circuit Judge:* This case is before us pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) on the petition of New Jersey State Lottery Commission to review a declaratory ruling of the Federal

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Communications Commission. Proceedings before the FCC commenced in February 1971 when Jersey Cape Broadcasting Corporation, a licensee of broadcast frequencies operating in Wildwood, New Jersey, filed a request for a declaratory ruling on the question whether its broadcast of the winning weekly number in the New Jersey State Lottery would violate 18 U.S.C. § 1304. Jersey Cape proposed to broadcast, during three consecutive regular news broadcasts on each Thursday, the day of the lottery drawing, and at no other time, a statement:

> The winning state lottery number drawn today is (and then recite the winning number).

In its declaratory ruling issued July 14, 1971 the FCC ruled that the proposed statement would violate 18 U.S.C. § 1304 and the FCC's rules interpreting that statute. 36 Fed. Reg. 13813 (1971). In a second ruling on July 27, 1971 the FCC made clear that its ruling prohibited the statement even as a news item in a regular news broadcast. 36 Fed. Reg. 14347 (1972). Thereafter petitioner New Jersey State Lottery Commission, pursuant to 47 U.S.C. § 405[1] filed with the FCC a timely petition for reconsideration. The FCC decision before us denied this petition for reconsideration. *In re Jersey Cape Broadcasting Corp.*, FCC 72–702, filed July 27, 1972. The Lottery Commission filed a petition for review of the July 27, 1972

[1] 47 U.S.C. § 405 provides:

"After an order * * * or action has been made or taken in any proceeding before the Commission * * * any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing * * *."

The FCC does not challenge the Lottery Commission standing.

Memorandum and Order in this court within the time permitted by the statute.[2] 47 U.S.C. §§ 402(c), 405.

Before the FCC the Lottery Commission established its status as a person aggrieved or whose interests would be adversely affected. The State Lottery is authorized by a 1969 amendment to the state constitution and by the State Lottery Law, N.J. Stat. Ann. §§ 5:9–1 to 5:9–25. The Lottery Commission commenced sale of lottery tickets in December 1970. The winning number is drawn every Thursday morning. The Lottery Commission claims that each Thursday it is confronted with a difficult problem in coping with the public demand for information of the winning number. Its telephone service was temporarily suspended on August 19, 1971, due to an overload of telephone calls. Records of the New Jersey Bell Telephone Company indicate that its twelve automatic answering and announcement machines in Newark, specially installed for the Lottery Commission to announce the winning numbers to callers in the northern half of New Jersey, receive an average of 5,500 calls between the hours of 9:30 a.m. and 2:30 p.m. on Thursdays. Five additional machines have been installed in Newark. In addition to the calls completed, 32,000 and 63,000 "overflow" calls were attempted on August 12 and August 19, 1971, respectively. Many phone calls requesting the winning lottery number have also been made to newspapers

[2] By order dated November 3, 1972, we granted motions of the states of New Hampshire and Pennsylvania to intervene as petitioners. The Maryland Public Broadcasting Corporation has filed a brief as amicus curiae in support of the petition for review.

throughout the state commencing at approximately 11:30 a.m. on Thursdays. On a typical Thursday, 2,750,000 ticketholders are interested in the winning number.

The FCC, in issuing the challenged ruling, acted pursuant to the Communications Act of 1934. *See* Act of June 19, 1934, ch. 652, 48 Stat. 1064, 1086, 1088, 1091. The provisions of that statute relevant to this case are found at 18 U.S.C. § 1304, 47 U.S.C. § 312(a)(6) and 47 U.S.C. § 326. 18 U.S.C. § 1304 provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The FCC can under 47 U.S.C. § 312(a)(6) revoke any station license for a violation of 18 U.S.C. § 1304. 47 U.S.C. § 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

In its ruling the FCC made no effort to reconcile the three statutory provisions. Relying entirely on 18 U.S.C. § 1304, on its *Supplementary Declaratory Ruling*, 21 F.C.C. 2d 846 (1970), and on the decision of the Second Circuit in *New York State Broadcasters Association* v. *United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970) (which does not discuss 47 U.S.C. § 326), the FCC held that it had authority to prohibit a broadcast frequency licensee from announcing the winning lottery number as a news item in a regular news broadcast.[3] We conclude that the FCC misconstrued the congressional mandate in the Communications Act of 1934. Nothing in that statute was intended to permit the exercise by the FCC of control over editorial decisions of broadcast journalists. On the contrary as 47 U.S.C. § 326 makes clear, Congress expected the FCC's actions to be consistent with the first amendment.

The FCC ruling imposes a small prior restraint. It is, nonetheless, a prior restraint upon the dissemination of information of interest, on the day of the lottery, to perhaps 58% of New Jersey's adult population. There are three possible justifications for such a restraint. One is that the information is of such nature that it is not protected by the first amendment. *E.g.*, *Miller* v. *California*, 413 U.S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973); *United States* v. *Orito*, 413 U.S. 139 (1973); *Kaplan* v. *California*, 413 U.S. 115 (1973); *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973). The second is that although the information ordinarily is protected by the first amendment, the agency applying the restraint is exempt from its strictures. *E.g.*, *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972). The third is that although the information is protected and the agency is not exempt from the first amendment, the restraint is only reasonably

[3] *Compare* this position *with In re Broadcasting of Information Concerning Horse Races*, FCC 73-355, filed April 3, 1973.

incidental to the achievement of another valid governmental purpose. *E.g., Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F.2d 676 (3d Cir.), *cert. denied*, 409 U.S. 933 (1972).

The FCC does not urge the third justification; indeed 18 U.S.C. § 1304, as interpreted in the proceeding under review, has no purpose other than restraint upon the dissemination of information. The FCC does, however, urge both of the other justifications. In its initial decision on petitioner's request for a ruling, it held that the winning lottery number was not "news" and therefore was not protected by the first amendment. When the Lottery Commission petitioned for reconsideration, it held that even if the winning number had some news value to some persons, its broadcast would directly promote a lottery, and could therefore be prohibited by the FCC. On both grounds the FCC is wrong.

The contention that on Thursday afternoon the winning number in the New Jersey lottery is not "news", in a broadcast context, is simply frivolous. In *Rosenbloom* v. *Metromedia, Inc.*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971), we stressed the "hot news" value of broadcast news summaries given in hourly or half-hourly reports, and said:

> The primary value of these items to the public is in conveying the latest news as promptly as possible so that it has the opportunity to be informed of news items of possible immediate public concern. *Id.* at 895.

On Thursday afternoon and evening the winning lottery number is "hot news". By Friday afternoon it is merely history, with which broadcast journalism is only peripherally concerned. The FCC reasons that because the winning number is of interest to only a

limited class of persons (a mere 2,750,000 ticketholders on a typical Thursday), it is not an item of news, and hence is not protected information. Setting aside the question whether the first amendment recognizes a distinction between news and mere history, *see e.g., Winters* v. *New York*, 333 U.S. 507 (1948), we reject the premise that the size of the class of persons interested determines what is news. If this were the determinant, stock market quotations would not be news and, hence, apparently could be censored, since on any given Thursday more persons in New Jersey are interested in the winning lottery number than in the closing price of any given security. If this were the determinant, most obituaries would not be news; the arrivals of out-of-town buyers in the clothing market would not be news;[4] the expected time of arrival of a steamship would not be news.[5] The first amendment makes clear that it is beyond the competency of any governmental agency to determine, a priori, that any item of information is, for any news medium, not news.

Broadcast news media, because of the immediate and highly transitory nature of their news coverage, present particular problems in this regard. They, above all news media, serve the public need to be informed on what is of immediate though of passing interest. They at least as much as the other news media should be left free to make their own editorial decisions as to what news will best serve their public. The only restraints on information by which, in the news context, the broadcast media may constitutionally be bound are those imposed by what little is left of the law of libel since *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, and by the

[4] *See* New York Times weekly report.
[5] *See* New York Times daily report.

law of obscenity, *e.g. Miller* v. *California, supra; Paris Adult Theatre I* v. *Slaton, supra; United States* v. *Orito, supra; Kaplan* v. *California, supra; United States* v. *12 200-Ft. Reels of Super 8mm. Film, supra; see* 47 U.S.C. § 303(m)(1)(D). Clearly the winning lottery number is, on Thursday afternoon, press information protected by the first amendment.

Is the FCC, then, an exempt agency? To put the question conversely, does the circumstance that broadcasters are licensees of the federally owned broadcast frequencies make them, in the news context, subject to prior governmental restraints?

We can set to one side those cases dealing with a broadcaster's commercial activities. We assume for present purposes that Congress may constitutionally condition the grant of a license to use the federally owned broadcast frequencies upon an agreement by the licensees that they will disclose payments for broadcast information, 47 U.S.C. § 317, and that they will not, by the use of those frequencies, derive revenue from promotion of products or activities deemed by Congress unworthy of such promotion. *See Banzhaf* v. *FCC,* 405 F.2d 1082, 1101–03 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969); 15 U.S.C. §§ 1331–39; *cf. Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973). We assume, as well, that Congress may condition the grant of exclusive licenses to use the limited available number of broadcast frequencies upon reasonable agreements by the licensees designed to assure fair access of competing ideas to those frequencies. *See* 47 U.S.C. § 315; *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969); *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943). *Compare with Columbia Broadcasting System, Inc.* v. *Democratic*

National Committee, 412 U.S. 94 (1973). This case, however, falls in neither category. Jersey Cape Broadcasting Corporation seeks no more than to include in its regular news broadcasts on Thursday a news item of immediate, though transitory, interest to 2,750,000 persons. If Congress may condition the grant of a license upon submission to prior restraint against broadcast of this news item, how would one distinguish a condition imposing a prior restraint on the broadcast of stock market or commodity future prices, or indeed of any subject matter? We think it clear from 47 U.S.C. § 326 that in enacting the Communications Act of 1934 Congress, while exercising its plenary power to license use of broadcast frequencies, did not claim, directly or by implication, any power to impose conditions on the grant of such licenses which would violate the first amendment. The FCC interpretation of 18 U.S.C. § 1304 gives that provision of the Communications Act of 1934 undue weight while giving too little weight to the Congressional expression in the same statute set out in 47 U.S.C. § 326. The latter provision negates any intention on the part of Congress to make 18 U.S.C. § 1304 applicable to news broadcasts. A logical reconciliation of the two sections, and one which avoids a serious constitutional difficulty, restricts the application of 18 U.S.C. § 1304 to promotion of lotteries for which the licensee receives compensation. *But cf. New York State Broadcasters Association* v. *United States, supra.* Possibly, as Judge Feinberg suggests in *New York State Broadcasters,* some uncompensated promotional announcements outside the context of broadcast journalism might be found by the FCC to be promotional, and not news, and hence prohibited by 18 U.S.C. § 1304. We need not decide that issue in this case. The

announcements here involved are unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. § 326 and the first amendment rather than prohibited by 18 U.S.C. § 1304.

The petition for review will be granted and the ruling of the FCC will be reversed.

A True Copy.

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 72–1878

Official File—Litigation Division Office of General Counsel

NEW JERSEY STATE LOTTERY COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA, INTERVENOR

STATE OF NEW HAMPSHIRE, INTERVENOR

On Petition for Review of an Order of the Federal Communications Commission

Present: SEITZ, Chief Judge and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, and GARTH, Circuit Judges

JUDGMENT ON REHEARING

This cause came on to be heard on the certified list in lieu of the record from the Federal Communications Commission and was argued by counsel and later submitted en banc.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review be, and the same is hereby granted and the

order of the Commission, filed July 27, 1972, be, and the same is hereby reversed. Costs taxed in favor of petitioner.

Attest:

THOMAS F. QUINN,
Clerk.

JANUARY 2, 1974.

F.C.C. 72-702

APPENDIX C

Before the Federal Communications Commission,
Washington, D.C. 20554

In the Matter of

JERSEY CAPE BROADCASTING CORP.

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1972; Released July 27, 1972)

By the Commission: Commissioner Johnson concurring in the result; Commissioner Hooks not participating.

1. The Commission has before it the "Petition for Reconsideration" filed on August 18, 1971, by George F. Kugler, Jr., the Attorney General of New Jersey, in behalf of the New Jersey State Lottery Commission, and that of Joseph J. Maraziti, State Senator of Morris County, New Jersey, and Carl E. Erickson, Alderman of Dover, New Jersey, filed jointly on August 20, 1971.[1] Also before us for consideration is additional material consisting of a supporting brief and a request for oral argument furnished by the New Jersey State Lottery Commission on October 6, 1971,

[1] The joint petition also appended copies of several letters urging review from New Jersey members of the U.S. Senate and House of Representatives.

to supplement the information contained in the original petition.[2]

2. Petitioners are requesting the Commission to reconsider the declaratory ruling, released on July 20, 1971, 30 FCC 2d 794, in the Matter of Jersey Cape Broadcasting Corporation, in which we indicated that the proposed broadcasts of the winning number in the New Jersey State Lottery would violate 18 U.S.C. § 1304 and the Commission's regulations which prohibit the broadcasting of "* * * any advertisement of or information concerning any lottery * * *."[3] In order to clarify this ruling, the Commission released a subsequent Public Notice on July 27, 1971 (36 Fed. Reg. 14347 (1971)) which stated, among other things, that the winning number may not be broadcast as part of a news item.

3. The ruling petitioners seek to reverse was given in response to the request of Jersey Cape Broadcasting Corporation, (hereinafter Jersey Cape), licensee of

[2] The Commission has received several letters in this matter and all of these have been taken into consideration in our action here.

[3] 18 U.S.C. § 1304 reads as follows:

"Broadcasting lottery information."

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or operating any such station knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes shall be fined not more than $1,000 or imprisoned not more than one year or both. Each day's broadcasting shall constitute a separate offense."

The applicable Commission rules (Section 73.122(AM), 73.292 (FM) and 73.656(TV)) essentially repeat the statute. They were recited in our previous ruling and need not be reiterated.

stations WCMC–AM–FM–TV, Wildwood, New Jersey, for a ruling that broadcasting of the winning state lottery number would not violate Section 1304 and the Commission's rules. Jersey Cape has not petitioned for reconsideration and the petitioners were not parties to the original request. However, it is clear from the matters stated in their respective petitions for reconsideration that they had no opportunity to intervene and that they are sufficiently aggrieved and adversely affected by the ruling, within the meaning of Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.106(b) of the Commission's rules, 47 CFR 1.106(b).

4. Jersey Cape's request proposed the following announcement for broadcast: "The winning state lottery number drawn today is (and then recite the winning number)." No further comment was to accompany the statement. The broadcasts were to take place on the day of the drawing and during three consecutive regular newscasts to commence at 12:00 noon shortly after the winning number had been drawn. The Commission recognized that the information to be broadcast had "some limited news value." Nevertheless, we decided that broadcasting it would violate the Federal lottery statute and the Commission's rules because to do so would directly promote a lottery. The decision was based primarily upon the guidance provided in the Commission's *Supplemental Declaratory Ruling* released March 2, 1970, 21 FCC 2d 846.

5. In the pleadings presently before us, the petitioner (New Jersey State Lottery Commission) makes basically the same argument as Jersey Cape made initially to the Commission, i.e., that the proposed broadcasts are legitimate news items concerning a lottery that only incidentally promote the lottery, and that therefore they are not prohibited by the Federal lot-

tery statute and the Commission's rules. Petitioner (New Jersey State Lottery Commission) relies upon the same authorities cited in the Commission's ruling but comes to a different result in applying them to the proposed broadcasts. The other petitioners (State Senator Maraziti and Alderman Erickson) principally contend that the proposed announcements "cannot be categorized" as information promoting a lottery. They are treated separately in this opinion since they present different reasons to support their position.

6. *The New Jersey State Lottery Commission:* Petitioner is the executive agency established by the New Jersey Legislature to administer the State Lottery Law. In seeking reconsideration, petitioner argues (as Jersey Cape did) that the "prime effect" of broadcasting the winning lottery number is to inform the public of a bona fide news item in which they are greatly interested, and that only incidentally is there any promotion of the lottery. Like Jersey Cape, petitioner contends that the case of *New York State Broadcasters Association, Inc.* v. *United States of America,* 414 F.2d 990 (2nd Cir. 1969), *cert. den.* 396 U.S. 1061 (1970) supports its position inasmuch as the case holds that 18 U.S.C. § 1304 prohibits only program materials which "directly promote a lottery" while permitting the broadcast of a bona fide news story even though such news may have an "incidental effect" of promoting a lottery.

7. In addition, petitioner cites in its behalf certain language contained in the *Supplemental Declaratory Ruling, infra,* p. 847, stating that the Federal statute "would appear not to bar news reports broadcast in normal good faith coverage which are reasonably related to the audience's right and desire to be informed

of the day-to-day happenings within the community."[4] Petitioner points out further that under Item 1 of the same ruling the Commission has authorized ". . . legitimate news stories appropriate to broadcasting," and has given as the reason for barring other news articles the fact that ". . . such time consuming listings are not ordinary broadcast journalism" (p. 848).[5]

8. Petitioner provides us with considerably more factual documentation than Jersey Cape did about the operation and importance of the State lottery, and contends that the various precedents permitting broadcasting of bona fide news items about lotteries should be examined against this factual background.[6] Peti-

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[4] Petitioner acknowledges that this language appeared initially in the September 25, 1968 declaratory ruling concerning the New York State Lottery, 14 FCC 2d 707, which was set aside by the Court in the *New York State* case. Petitioner states, however, that we have never repudiated this general construction of the statute.

[5] Petitioner also notes that under Item 3 of the *Supplemental Declaratory Ruling* an exception has been made for an explanation about how profits from the lottery will be distributed if the announcement is "part of the licensee's good faith effort to inform the public" and is not accompanied by other news directly promoting the lottery.

[6] For example, petitioner indicates that it has retained a professional advertising and public relations firm (Bofinger-Kaplan) to handle practically all direct promotional activities of the lottery, and states: "It would be fair to conclude, therefore, that all information which may validly be categorized as promotional is necessarily attributable to Bofinger-Kaplan, whereas all information which may validly be categorized as news may be attributable to other sources as well as to Bofinger-Kaplan." With this in mind, petitioner inisits it is very significant that the announcement of the winning number is not supplied to the communications media by the advertising agency. Petitioner notes that the independent wire services obtain the number by

tioner then makes the following points: No plea to buy tickets or other promotional information concerning the lottery would be included in the announcements of the winning number. The announcements would not be comparable to the promotional material prepared by the advertising agency. They would be "news" and the stations would simply be reporting what the wire services had decided was newsworthy. The public demands this information and thus it is to be regarded as "news reports broadcast in normal good faith coverage which are reasonably related to the audience's right and desire to be informed of the day-to-day happenings within the community." The wire services do not report specific promotional material prepared by the advertising agency and thus ". . . there could hardly be a better practical determinant of 'normal good faith coverage' of news than the contents of a wire service teletype, for the wire services report 'news' and not 'direct and exhortative' promotional material." The announcements "would be entirely appropriate to ordinary broadcast journalism," and they would be even less "time consuming" than broadcasting information on the time, weather, traffic, stocks and sports.

9. Moreover, petitioner indicates that the broadcast of the winning number should be considered in connection with the Commission's standards for determining a "bona fide news-type program" contained in FCC 70–871, "Use of Broadcast Facilities by Candidates for Public Office," 35 Fed. Reg. 13048 (1970).

10. Petitioner submits that the Commission has made an "unfortunate assumption" in stating that

telephoning the Lottery Commission and that Jersey Cape obtained the information from a news service teletype prepared by the wire services.

the proposed announcements would be of interest to a "limited class of people" and therefore that they would be of "limited news value." Petitioner contends the broadcast of the winning number is of "significant news value" and that the statistical documentation showing the large numbers of interested people participating in the lottery should provide us with an adequate ground for reconsideration. Petitioner also stresses the impossibility of its contacting the winner[7] and notes that publicizing the winning number is a "mechanical task" not requiring the assistance of its advertising firm. In view of this, petitioner submits the following proposition:

> In other words, promotion is the publicizing of that information which the Lottery Commission wants to convey in order to raise revenue by selling tickets, and news is the dissemination of that information which the public demands to know.

11. Lastly, petitioner contends that a "news" item may not be banned because the Commission considers it "reasonably necessary or helpful to the conduct of the lottery" (30 FCC 2d 795). Petitioner submits that under such a test, we should bar information giving the World Series, Super Bowl and horse racing results, since broadcasting this information is also "reasonably necessary or helpful" to the conduct of certain lotteries.

12. It is clear from the foregoing that petitioner is taking essentially the same position as Jersey Cape did although considerably more factual evidence and

[7] Until the purchaser files a claim based on his ticket number, the Lottery Commission is not able to determine the winner. It keeps no records of names and addresses of lottery ticket purchasers.

legal arguments have been presented. However, we do not believe that petitioner has correctly interpreted the precedents in this area, and as we have stated, at 30 FCC 2d 795, in the ruling which is the subject of petitioner's request here:

> * * * The *New York State* case does not, in our view, support Jersey Cape's position. While the Court recognized, at 414 F.2d 998, the distinction between information directly promoting a lottery (prohibited by 18 U.S.C. § 1304) and information which is simply "news" of a lottery (not prohibited), it did not define "direct promotion of a lottery." Accordingly, for specific guidance to broadcasters, it remanded the case to the Commission to apply its expertise to the problem.

We adhere to our view that the question here can be adequately answered from the guidance provided by the Commission in the *Supplemental Declaratory Ruling*. That ruling specifically indicates that the Commission regards such items as "[a]nnouncements (unpaid) of the places where lottery tickets may be purchased, where, how, and when winning tickets will be drawn, the amount of prizes, and how the proceeds of the sales of lottery tickets are and will be distributed" as items having only limited news value that directly promote a lottery. We continue to believe that the broadcast of the winning number in the State lottery is in this same category.[8]

13. We are not persuaded by petitioner's reasoning, based upon the specific situation in New Jersey, as

[8] In the *New York State* case at page 998, the Court expressly recognized that a "news" item having only an "incidental effect of promoting a lottery" is permissible. On the other hand, the Court cautioned that a lottery advertisement or announcement containing "'news' such as the amount a lottery realized for education . . . would nonetheless be banned."

to why the broadcast of the winning number should fall within the explanation of permissible broadcasting of bona fide news concerning lotteries described in the *New York State* case and in the *Supplemental Declaratory Ruling*. Even assuming that petitioner is correct in attributing most direct promotional activities to its advertising agency, we do not think it necessarily follows that information received by a broadcaster from an independent source, such as the wire services, is therefore to be regarded as a legitimate news story appropriate for broadcasting within the meaning of Items 1 and 3 of the *Supplemental Declaratory Ruling*.[9] Nor does the fact that the wire service treat the information as newsworthy automatically make it "news" for purposes of the lottery statute. The public demand may be "truly staggering" but it cannot change the law to permit the broadcast of information directly promoting a lottery. We would point out that the length of a news item is not the only factor the Commission considers in deciding whether a news item is "ordinary broadcast journalism" and that brevity alone is not enough to authorize an announcement giving information about a lottery. Moreover, weather reports, stock reports and the like are permissible not because of their short duration but because there is no Federal policy or statute designed to inhibit their broadcast by denying access to facilities over which the Federal Government has control.

14. Further, the Commission's standards contained in FCC 70–871, "Use of Broadcast Facilities by Candidates for Public Office," *supra*, are concerned with

[9] Petitioner does not assert that the advertising agency never engages in news dissemination activities. However, its brief states that "[n]either petitioner nor Bofinger-Kaplan issues news releases of any kind to broadcasting media."

the "equal opportunities" doctrine relating to the use of broadcasting facilities by legally qualified candidates for public office and have no bearing on determining whether a piece of information is a bona fide news item outside the prohibitions of the lottery law and regulations.

15. We also believe petitioner's arguments indicate some misunderstanding of the Commission's statement in *Jersey Cape* in which it was said that the proposed broadcasts do "not concern announcements of persons who have won" but instead would be devoted to "publicizing" the "winning number," and that the "widespread dissemination of such information" is "reasonably necessary or helpful to the conduct of the lottery and of interest only to that limited class of people who actually hold tickets." That language was intended to give the reasons why we think the proposed broadcasts would violate the basic prohibition of the statute against the broadcast of material which directly promotes a lottery. The purpose of explaining that the broadcast of the winning number would not present information about the persons who have won was to distinguish this kind of limited news item from items of general interest such as human interest stories about the winners which are expressly permitted under Item 6 of the *Supplemental Declaratory Ruling*.[10] The reference to a "limited class of people who actu-

[10] In that ruling, the Commission found permissible the broadcast of "Interviews with persons holding winning lottery tickets, relating, among other matters of general interest, to the number of tickets they purchased, their expectation of winning a prize, their reactions upon learning that they held winning tickets, and what they did or intend to do with the prize money." The Commission stated that "Such interviews are permissible as part of the licensee's good faith judgment as to information serving the interests of its area."

ally hold tickets" was meant to emphasize that even information of some news value to some persons is prohibited if its broadcast would directly promote a lottery." We think petitioner's admission that it needs to announce the winning number over the air because it does not have the information necessary to determine the identity of the winner merely serves to reinforce the finding that the broadcasts of the winning number would directly promote the lottery, or as we said in *Jersey Cape,* that the "widespread dissemination" of this information is "reasonably necessary or helpful to the conduct of the lottery." As for petitioner's suggestion that we should not permit the broadcast of the results of the World Series, Super Bowl, or horse races because information about them is "reasonably necessary or helpful to the conduct of the lottery," it is apparent that these are independent sporting events of legitimate interest to the viewing public and that such broadcasts are not being utilized as a means of publicizing the names of prize winners.

16. Petitioner also seeks an opportunity for oral argument before the Commission. However, in considering this request we have determined that the facts and the law are clear. The Court has decided in the *New York State* case that the lottery prohibitions are applicable to a legal state-operated lottery. Regardless of the public demand for this information and regardless of the need for wider publication of the winning

[11] In this connection, it is pertinent to note that the Court in the *New York State* case specifically rejected an argument that all advertisements concerning the State lottery may not be banned because they convey information on "matters of highest public interest and concern." The Court stated as follows: "To the extent that information of public interest and concern was to be conveyed, it was wholly incidental and subordinate to the promotion and thus properly prohibited." (P. 998).

lottery number, the Commission cannot relax the prohibitions of the Federal statute. The issue is for Congress not the Commission to resolve and we believe no useful purpose would be served by scheduling oral argument.

17. Joseph J. Maraziti and Carl E. Erickson: In their joint petition, they contend that announcing a winning lottery number is not comparable to prohibited announcements (unpaid) regarding locations where lottery tickets will be sold, the conditions under which the drawing will take place, the amounts of prizes, and how the proceeds of the lottery will be distributed. They base their argument upon the theory that 18 U.S.C. § 1304 prohibits the broadcasting of future events about a lottery that can be said to promote a lottery. They point out that announcing the winning number concerns a past event and that no one hearing such an announcement would be encouraged "to run out and buy a ticket or increase his normal purchase by hearing this report." They also maintain that announcing the winning number is indistinguishable from the broadcast of "top prize winners" which they say is recognized in our ruling as protected by the First Amendment. As a specific example of a permissible announcement they give the following and argue that if its broadcast is allowed, it is the same thing as an announcement that "the winning number was 123456":

> [T]he winning lottery ticket was drawn at the Cherry Hill Shopping Mall by Miss America, surrounded by the Governor and other State and Local officials. The top prize winner was John Doe.

They further note that broadcasting the winning number should not be regarded as a " 'scoop' which enhances interest in the lottery" because the lottery

ticket distributors post it immediately after the drawing and the press reports the winner a few hours later.

18. We find no support for petitioners' construction of the lottery statute in the decisions of the courts interpreting the statute. We recognize that the statute is to be narrowly construed because of first amendment considerations; however, the only judicial opinion specifically interpreting the "information concerning" language of the statute is the *New York State* case wherein the Court held that the test for determining whether material is prohibited by the statute is whether it "directly promotes a particular existing lottery," *supra,* p. 997. It should also be noted that the statute itself expressly prohibits a "list of the prizes drawn or awarded" which is, of course, information concerning a past event.

19. In addition, we think petitioners are incorrect in assuming that their example of a news item would be suitable for broadcast. As pointed out previously in this opinion, news matters of general interest about the winners would not violate the statute. However, the example given would not appear to contain information of the type described under Item 6 of the *Supplemental Declaratory Ruling.* (See paragraph 15 and footnote 10, *supra.*) As for petitioners' argument that the proposed broadcasts of the winning number would not encourage participants to do anything more to improve their chances of winning, we submit that petitioners have overlooked the stimulation such announcements would have in arousing and maintaining interest in the lottery as well as the importance to the Lottery Commission of communicating this information in order to assure the participants that they will not lose out on the big prize because of inadequate notification procedures.

20. We recognize the anomalous situation where the several states have enacted state lottery legislation and in accordance therewith are operating constitutional State lotteries and, in an effort to bring the lottery to the attention of their citizens, desire to utilize the broadcast media. We also note that this situation has been recognized by the Congress in its consideration of pending legislation concerning this subject. Nonetheless, until the present lottery statute is amended or qualified in any way, the Commission has no alternative but to apply the requirements of that statute.[12]

21. Accordingly, IT IS ORDERED, that the request for oral argument filed by the New Jersey State Lottery Commission, IS DENIED.

IT IS FURTHER ORDERED, THAT the petitions for reconsideration filed by the New Jersey State Lottery Commission and by State Senator Joseph J. Maraziti and by Alderman Carl E. Erickson, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[12] The lottery prohibition is a criminal statute in Title 18 of the U.S. Code and, as the Supreme Court held in *Federal Communications Commission* v. *American Broadcasting Company, Inc.*, 347 U.S. 284 (1954), the authority of the Commission with respect to its application is concurrent with that of the Department of Justice. In view of this, Commission action in this area is coordinated with the Department of Justice, and this procedure has been followed with respect to this proceeding.

U.S. GOVERNMENT PRINTING OFFICE: 1974